IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 17-1775

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block 3605, Lot 1, Queens, New York,

Plaintiff-Appellee,

against

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER AND MARVIN RATNER,

Defendants-Appellants,

and

THE CITY OF NEW YORK, ROBERT HALL METROPLEX CENTER CORP., R. H. MACY & CO., INC., STONE SUPPLY CO., INC., BLACKMAN-SHAPIRO CO., INC., A TO Z EQUIPMENT CORP., GLOBE PIPE & FITTING CO., INC., ABCO INDUSTRIAL SUPPLY CORP., CARPENTER AND PATERSON OF NEW YORK, INC., NEILL SUPPLY CO., INC., BALTIMORE AIRCOOL COMPANY, a subsidiary of MERCK & COMPANY, INC., MATERIAL STRENGTH, INC., ALBERT SAGGESE, INC., RAC MECHANICAL, INC., SAL PICONE & SONS, INC., ALBERT PIPE SUPPLY CO., INC., MUNRO WATERPROOFING, INC., HANLEY COMPANY INCORPORATED, JOEL J. CHAIT PLUMBING & HEATING CORP., J. C. EXCAVATION CORP., TRIPLE M. ROOFING CORP., REUTHER MATERIAL CO., PETROLEUM FOR CONTRACTORS, INC., NATIONAL LIGHTING SUPPLY CO., INC., KELLEY COMPANY, INC., FLOCKHART FOUNDRY COMPANY, STYRO SALES COMPANY, INC., CONTRACTORS SUPPLY CORP., MASON MIX, INC., ADVANCED AIR CONTROL CORP., LIGHTING ASSOCIATES, INC., STANTON SAMSON CORP., WORTH SUPPLY CO., INC., ROBERT E. LEVIEN, PRINCE CARPENTRY, INC., LITEMORE ELECTRIC CO., INC. and SCHECTMAN CARPENTRY, INC., ARGONAUT INSURANCE COMPANY, BILLEN AIR CONDITIONING, INC. and REVO MECHANICAL INC.,

Defendants.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

EDWARD L. SADOWSKY
Attorney for Appellants
100 Park Ave.
New York, New York
(212) 953-1800

TENZER, GREENBLATT, FALLON & KAPLAN
MONA D. SHAPIRO
of Counsel

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 17-1775

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block 3605, Lot 1, Queens, New York,

Plaintiff-Appellee,

against

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER AND MARVIN RATNER,

Defendants-Appellants,

and

THE CITY OF NEW YORK, ROBERT HALL METROPLEX CENTER CORP., R. H. MACY & CO., INC., STONE SUPPLY CO., INC., BLACKMAN-SHAPIRO CO., INC., A TO Z EQUIPMENT CORP., GLOBE PIPE & FITTING CO., INC., ABCO INDUSTRIAL SUPPLY CORP., CARPENTER AND PATERSON OF NEW YORK, INC., NEILL SUPPLY CO., INC., BALTIMORE AIRCOOL COMPANY, a subsidiary of MERCK & COMPANY, INC., MATERIAL STRENGTH, INC., ALBERT SAGGESE, INC., RAC MECHANICAL, INC., SAL PICONE & SONS, INC., ALBERT PIPE SUPPLY CO., INC., MUNRO WATERPROOFING, INC., HANLEY COMPANY INCORPORATED, JOEL J. CHAIT PLUMBING & HEATING CORP., J. C. EXCAVATION CORP., TRIPLE M. ROOFING CORP., REUTHER MATERIAL CO., PETROLEUM FOR CONTRACTORS, INC., NATIONAL LIGHTING SUPPLY CO., INC., KELLEY COMPANY, INC., FLOCKHART FOUNDRY COMPANY, STYRO SALES COMPANY, INC., CONTRACTORS SUPPLY CORP., MASON MIX, INC., ADVANCED AIR CONTROL CORP., LIGHTING ASSOCIATES, INC., STANTON SAMSON CORP., WORTH SUPPLY CO., INC., ROBERT E. LEVIEN, PRINCE CARPENTRY, INC., LITEMORE ELECTRIC CO., INC. and SCHECTMAN CARPENTRY, INC., ARGONAUT INSURANCE COMPANY, BILLEN AIR CONDITIONING, INC. and REVO MECHANICAL INC.,

Defendants.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants Rentar Industrial Development Corp., Rentar Industrial Development Associates, Vertical Industrial Park Associates, Arthur Ratner, Dennis Ratner and Marvin

Ratner submit this brief in response to appellee's motion to dismiss this appeal or, in the alternative, to affirm the order of the New York Court of Appeals ["Motion"].

ARGUMENT

A. No issues of fact preclude a determination by this Court that the New York Lien Law is unconstitutional

The courts below found appellants' constitutional claim ripe for decision. The so-called "issues of fact" were not relevant in the courts below nor are they relevant to the issues before this Court. Motion, pp. 8-10.

First, if, as appellants contend, the filing of a mechanic's lien effects a deprivation of property within the meaning of the Fourteenth Amendment, then proof of actual damages suffered by appellants is not necessary. See Appellants' Jurisdictional Statement on Appeal From the Court of Appeals, State of New York ["Jurisdictional Statement"], pp. 12-15.

In addition, proof of a desire by the Bowery Savings Bank to avoid its mortgage commitment to appellants would not show that apellants have not been damaged. In today's construction industry, no mortgagor will close its loan with substantial liens outstanding against the property. *See,* Jurisdictional Statement, p. 14. In this case, appellee filed over one million dollars worth of liens against appellants' property, and those liens were exaggerated by about $450,000. Appellee nowhere denies that its liens were exaggerated.

Neither would any trial on the merits ever result in a finding that this case is governed by *D. H. Overmyer Co. Inc.* v. *Frick Co.,* 405 U.S. 174 (1972). The fundamental and dispositive difference between this case and *Overmyer* is that, in the latter case, the parties had agreed in writing to the objectional procedures. 405 U.S. at 187. Here,

there was a writing, a completely integrated agreement, which makes no reference to appellee's right to file a lien.

Overmyer cannot be construed to require examination into parties' negotiations. Indeed, waiver must be apparent from the face of the parties' agreement:

> For a waiver of constitutional rights in any context must, at the very *least,* be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver. *Fuentes* v. *Shevin,* 407 U.S. 67, 95 (1975).

See also, *Garner* v. *Tri-State Development Company,* 382 F. Supp. 377, 381 (E.D. Mich., S.D. 1974).

There is no voluntary, intelligent and knowing waiver of rights apparent on the face of the agreement between appellants and appellee, as appellee concedes. *See Overmyer,* 405 U.S. at 187; Motion, p. 9. Indeed, Article 12 of the agreement provides that "all claims" and "disputes" between the parties were "to be submitted and determined pursuant to the New York Simplified Procedure for Court Determination of Disputes in the Supreme Court of the State of New York, First Judicial District". This article makes clear that the parties never contemplated either recourse to mechanics' liens or a waiver of constitutional rights.

In addition, even if the parties had agreed that appellee could file a lien, it cannot be suggested that the parties intended that appellee could file false and exaggerated liens.

Finally, as the court in *Overmyer* made clear, the agreed upon procedures were not unconstitutional *per se.* 405 U.S. at 187-188. Here, the procedures of the Lien Law are unconstitutional *per se* because they failed to give appellants (and every aggrieved owner) an early judicial hearing.

In light of the above, appellee's contention that this appeal is not a "final judgment or determination" within the meaning of 28 U.S.C. § 1257(2) is incorrect. This case comes squarely under the rubric of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481-486 (1975).

B. *Spielman-Fond* is not dispositive of this case

This Court's summary affirmance in *Spielman-Fond, Inc.* v. *Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd w/o opn.*, 417 U.S. 901 (1973), did not settle the issues raised by appellants in this case. See Jurisdictional Statement, pp. 11-12.

Appellee asserts that the Mechanic's Lien Laws of Arizona and New York are not different "in any constitutional sense". Motion, p. 10. However, the New York Lien Law lacks even the minimal due process protections contained in the Arizona Law.

Although the Arizona Law upheld in *Spielman-Fond* does not provide for notice or a prior hearing, it requires the lienor to serve a copy of the notice of lien upon the owner of the real property "within a reasonable time" after recording the lien. The notice of lien is also required to be made "under oath by the claimant or someone with knowledge of the facts". Ariz. Rev. Stat. Ann. § 33-993.

Under the New York law, after the notice of lien is recorded, "the lienor may serve a copy" of the notice of lien on the owner. However, no notice of filing is required to be given. Furthermore, the notice of lien need not be a sworn statement based on personal knowledge; it may be verified by the lienor or his agent on information and belief. Lien Law (McKinneys 1966) ["Lien Law"], §§ 9(7), 10, 11.

More significantly, the Arizona law requires a lienor to institute a suit to enforce his lien within six months of

filing. Ariz. Rev. Stat. Ann. § 33-998. As the Connecticut Supreme Court observed, "[s]uch a provision would seem to offer the bare minimum of due process protection consistent with the extent of deprivation present". *Roundhouse Const. Corp.* v. *Telesco Masons Supplies Co.*, 168 Conn. 371, 362, A.2d 778, 783 (1975), *reaffirmed*, 170 Conn. 155, 365, A.2d 393 (1975), *cert. den.* 429 U.S. 889 (1976).

Section 17 of the New York Lien Law, which is reproduced at pp. 10a-11a of appellants' Jurisdictional Statement, requires that the lienor commence an action to foreclose the lien within one year after the notice of lien has been filed. However, the lienor may obtain an order by a court of record within *one year* of filing the lien "continuing such lien" and, therefore, obviating the necessity of commencing an action to foreclose. "[A] new order and entry may be made in each successive year." Thus, in effect, under the New York Lien Law, a lienor may, for year after year, avoid judicial review of his lien or liens. No such extension procedure is provided for in the Arizona Mechanic's Lien Law.

Plenary consideration is required to determine whether the procedures of the New York Lien Law meet constitutional standards of due process.

C. No procedure was available to appellants whereby they could obtain immediate judicial review of appellee's liens

Appellee misleads this Court when it asserts that, under the Lien Law, appellants could have obtained a swift judicial determination as to whether appellee's liens were exaggerated. Motion, pp. 12-13.

Under New York law, the right to challenge a lien on the ground of exaggeration is always reserved for the trial of the foreclosure action. *Application of Upstate Builders Supply Co.*, 37 A.D. 2d 901 (4th Dep't. 1971), *app. dism'd.* 30 N.Y. 2d 515 (1972).

CONCLUSION

Appellee's motion should be denied in all respects. The decisions below warrant summary reversal. In any event, this Court should note probable jurisdiction and resolve the questions presented with briefs on the merits and oral argument.

July, 1978

Respectfully submitted,

EDWARD L. SADOWSKY
Attorney for Appellants
100 Park Avenue
New York, New York

TENZER, GREENBLATT, FALLON & KAPLAN
MONA D. SHAPIRO
Of Counsel